EXHIBIT B

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Lead Case Nos. 08-13555-JMP and 08-01420-JMP (SIPA)

Adversary Case No. 1-09-01482

- -x

In the Matter of:

LEHMAN BROTHES HOLDINGS INC., et al.

Debtors.

- -x

In the Matter of:

LEHMAN BROTHER INC.

Debtor.

- -x

CYNTHIA SWABSIN, et al.,

Plaintiffs,

-against-

LEHMAN BROTHERS HOLDINGS INC.,

Defendant.

- -x

(CONTINUED ON NEXT PAGE)

United States Bankruptcy Court

One Bowling Green

New York, New York

January 21, 2010

2:07 PM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

HEARING re Motion Filed by Merrill Lynch International for Relief from the Automatic Stay.

HEARING re Motion Filed by the California Public Employees Retirement System for Relief from the Automatic Stay.

HEARING re Pre-Trial Conference and Motion Filed by the Defendant to Dismiss.

HEARING re Motion Filed by the California Public Employees Retirement System for Relief from the Automatic Stay to Effect Setoff Against LBI Funds Currently Held by Securities Finance Trust Company.

Transcribed by: Pnina Eilberg

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THE COURT: Is there more for this?

(No response)

THE COURT: Okay. We have one more matter. I'm going to take a ten minute break and resume at 3:30. Anyone who wishes to be excused, obviously is free to leave. Anyone who wishes to stay for the proceedings at 3:30, you're welcome to stay. I'll see you at 3:30. We'll take a ten minute break.

(Recess from 3:19 p.m. until 3:34 p.m.)

THE COURT: Be seated, please.

MR. O'NEILL: Good afternoon, Your Honor. Brad O'Neill of Kramer Levin, special counsel to the debtors.

We're here this afternoon on a motion to dismiss this adversary proceeding. Your Honor has seen this fact pattern before, although it arose in a somewhat different procedural context. And the motion has both substantive and procedural dimensions, with your indulgence I'd like to start with the substantive side because I think it simplifies the procedure.

The facts, as alleged in the complaint, are as follows. The plaintiffs were employees of Lehman who were terminated early in September of 2008. The week before the petition date they were given forms of separation agreement, which they signed before the petition date.

The terms of the separation agreement provide a -- contain a complete release of all claims arising from the plaintiffs' employment, including all claims arising under the

severance policy of Lehman. In return for that release, among other things, the separation agreement provides each of the plaintiffs with a fixed stream of payments payable in two-week intervals over varying periods of time for each employee. For one I think it's six months and for the other it's in excess of a year.

On the substantive side, the plaintiffs have filed this adversary proceeding seeking, A, a declaration that they are entitled to both administrative claims and/or priority claims in respect of amounts due but unpaid under the agreement -- I left something out. The initial payment was made under these agreements, the initial payment was made, I think, two days after the petition date. Thereafter, the debtors sent notice to each of the plaintiffs that they would not be making further payments. And the claims have, in fact, been scheduled for each of these plaintiffs.

The plaintiffs seek a declaratory judgment that the claims to which they're entitled are in fact administrative claims or, in the alternative, priority claims.

THE COURT: Let me follow up on something you said a moment ago. Is it the case that the debtors' schedules schedule claims for unpaid compensation pursuant to the severance agreements as to all of the plaintiffs that are in the punitive class that these nominal plaintiffs would seek to represent in the adversary proceeding?

MR. O'NEILL: I believe -- I don't know the answer with certainty but I believe the answer to be yes.

THE COURT: Okay.

MR. O'NEILL: The -- and secondarily they assert a claim for breach of these separation agreements.

First with respect to the claim for administrative priority. The typical standard or the applicable standard for the allowance of an administrative claim requires a transaction with the estates, not with the prepetition debtor. And it requires that the transaction or administrative claim is only allowed to the extent there is actually benefit to the estate. Here it's clear that the, and I don't think there's any dispute, that the contract on which these claims are based is a prepetition claim made with the prepetition debtor. And I don't think there's even any dispute about whether or not there was benefit conferred on the estate. There isn't an allegation in the complaint that there was benefit and I don't think that, I could be wrong but I don't think you're going to hear that these employees who did not work for even a single day for the debtors postpetition, conferred benefit on the estate.

The theory, rather, is strictly Straus-Duparquet. And the argument, as I understand it is, Straus-Duparquet says that an employee who is terminated postpetition becomes entitled to -- and is entitled to severance -- his right to severance is deemed to accrue at the time of termination as compensation for

hardship. These employees, it is asserted, were terminated postpetition because under nonbankruptcy employment law they are considered employed until their salary payments cease. So in other words, you're an employee until the day you stop getting salary, thereafter you stop being an employee therefore that's the date of your termination.

Under the terms of the separation agreements, the payments were supposed to continue into the postpetition period. They did continue briefly but then they stopped almost immediately after the petition.

I think the simple response is, this case isn't Straus-Duparquet. This is not a case in which these plaintiffs had a right to a payment upon termination. While they may, at one point prepetition, have had rights under a severance policy, they surrendered those rights when they signed the separation agreements.

Under the separation agreements, they do not have a right to payment upon termination; they have simply a right to a fixed schedule of payments. So any right they have is founded exclusively on that agreement and it is a prepetition agreement and therefore a prepetition claim. And I think, in fact, the underlying theory of the plaintiff's argument here, which is that we're not terminated until you stop paying us, it doesn't make sense on its own terms because under their theory they're not terminated until no further payments are do. And

so in other words, you pay me everything I'm owed and then I'm terminated.

So if that's right, I don't think it is but if it is, when you're terminated there's nothing else due and you're not entitled to severance. So it doesn't -- the theory, I think, doesn't hold water on its own terms. It also doesn't hold water under Straus-Duparquet or under basic bankruptcy law. And in fact, Your Honor has considered, as I've said before, you've considered this fact pattern before.

Marie Hunter, who was another employee terminated in the same reduction in force, filed a motion for payment of an administrative expense back in the fall making essentially the same arguments. There were some minor variations but it's essentially the same argument. And Your Honor concluded that the fact that the contract was entered into prepetition was determinative and entered an order specifically denying her claim for an administrative expense to the extent that it was premised upon Straus-Duparquet. You did allow her to -- it was without prejudice to her ability to come back and demonstrate that she conferred benefit on the estate; she had actually worked for the estate postpetition.

Now on to the procedural side of things. The plaintiffs are asserting essentially prepetition claims. They have filed proofs of claim, which in our view is the appropriate procedure to follow. But they've also commenced an

adversary proceeding, which in our view is not the appropriate procedure to follow. We have cited Your Honor to a series of cases which support that. The proper procedure to follow is to file proofs of claim, it gives the -- those claims are deemed allowed immediately so that there is no need to have litigation if the debtor does not dispute the claims. And it also provides for a more orderly administration of the claims process. In a large case such as this one, if every claimant was allowed to push to the front of the line by filing an adversary proceeding, we would have chaos.

The response to that is that is presented by the debtors is -- by the plaintiffs, excuse me, is that Rule 7001 contemplates that a motion or an action to recover money or property is properly styled as an adversary proceeding. While that is an accurate quotation of the rule, the Rule 7001 adversary proceeding is expressly not intended to displace the proof of claim process. It's instead intended to allow the debtor to assert claims for money or property or to allow creditors to assert claims to specific items of property in the possession of the estate. It's not intended to provide an alternative avenue to assert prepetition claims or the district claims.

In fact, when you look at the advisory notes they're very clear that proofs of claim only become adversary proceedings A, once they're objected to and B, if the trustee

or the debtor objecting to them actually seeks relief of the type specified in Rule 7001.

Finally, the plaintiffs seek to style this as a class action. And there is well developed case law in this district that says in an adversary proceeding perhaps, or an adversary proceeding Rule 7023 applies. It does not, however, apply under -- in a contested matter under Rule 9014 unless Your Honor, in your discretion, decides it should. And there are no fewer than four cases decided in this district over the last decade or so which lay out standards which may guide your exercise of discretion and they particularly specify three factors which you should consider. The first of which is has the movant sought authority to proceed on the class basis. It's true that this issue comes up primarily in the context of proofs of claim but it is applicable, I think -- there's no basis to limit it to that.

There's no argument, I think, here that the plaintiffs have not sought that authority. Also, under the relevant cases there are fairly limited circumstances in which courts have exercised their discretion to allow class actions, in particular cases where a class has been certified prepetition or where there's some showing that notice is inadequate. Here, clearly there isn't a prepetition class but also there's no issue of notice.

The former employees, going back three years, were

provided with notice of the case. This matter, presumably, was fresh in everybody's mind at the time of the filing. And in fact, well over a hundred people have filed proofs of claim asserting claims in respect of these separation agreements. So I think there's no argument that notice was adequate, however that does take us to the next issue which is, is a class action consistent with the policies of bankruptcy, which are to centralize claims, to achieve a just, orderly, economic and expeditious resolution of claims. And I think here we would argue that the answer is no. There has been ample notice to the class, the punitive class. Many members of that class have taken advantage of the opportunity to file proofs of claim; those claims are, for present purposes, allowed. And there's no need to have anyone represent the interests of people who have not expressed an interest in being represented for what may be entirely unnecessary.

THE COURT: Let me break in on something you said. You said these claims are, for present purposes, allowed?

MR. O'NEILL: Proofs of claim are deemed allowed until they're objected to.

THE COURT: All right. But for purposes of the motion to dismiss, there are certain claims that have been scheduled, certain claims that are the subject of a proof of claim and at the moment at least, I'm not clear as to whether members of this punitive class are within the category of proofs of claim

filed or schedule claims or both.

MR. O'NEILL: Both.

THE COURT: So there are some members of the class that have claims that have been scheduled but have not filed proofs of claim, is that right?

MR. O'NEILL: I believe the number is around 150, Your Honor.

THE COURT: A hundred and fifty that have been scheduled?

MR. O'NEILL: Scheduled but no proof of claim.

THE COURT: And as to the scheduling of these claims, are they scheduled as prepetition unsecured claims?

MR. O'NEILL: Yes.

THE COURT: And as to the proofs of claim that have been filed, are they claims that have been filed for priority status, for administrative status and unsecured status or are they, sort of, all over the lot?

MR. O'NEILL: I think there is some variation in them. I'm not going to tell you I've reviewed every one. I would say the majority of them assert priority status.

THE COURT: All right. Go ahead.

MR. O'NEILL: And that raises an additional point, which is that to the extent a class action is certified, class actions are opt out as opposed to bankruptcy which is really opt in. And to the extent that one were to permit -- certify

an opt out class and permit people who have not filed proofs of claim to opt in, they would essentially be getting a second bite at the bar date. And that raises due process concerns, I think, for those who actually did see and comply with the bar date.

The only -- and then finally, before exercising discretion to allow a class action to proceed in a contested matter, courts have required a showing that the plaintiff comply with Rule 23 and have conducted analyses of the various Rule 23 factors.

We have outlined our position on those factors in our papers. There really has been no response in the plaintiff's papers. To be brief, we argued that you can't show superiority because basically bankruptcy's different. Bankruptcy does most of the things a class action is supposed to do. And introducing the class action concept compromises bankruptcy in some way by adding an additional layer of procedural complexity, adding cost and monkeying around with the bar date.

We also pointed out that they will have trouble showing luminosity because this class, the punitive class, is not large by class standards. In fact, we've cited cases showing -- refusing to certify classes, punitive classes that were much larger on this ground. And also because the class members are geographically not disbursed, undisbursed. They're located in the tri-state area, overwhelming. Not exclusively

but overwhelmingly. And those -- that factor is directly relevant to the class action analysis. Plus, there are also individual issues such as are people insiders and does that render these agreements avoidable under the modifications to Section 548(a). There are provisions in the CFR relating to golden parachute payments, all of which are individual not class specific.

And in addition, the primary rationale that I think you're offered to certify a class -- why a class is appropriate here is because there are asserted to be common legal issues and the Court can efficiently resolve common legal issues in the context of a class action. And while that's true as far as it goes, I'm not sure it justifies having a class action here because, frankly, everything's centralized in front of you already. And as you pointed out in the proceeding before the break, your decisions are law of the case and anything you do in this case -- if you were to do it in an individual matter it's going to be generally applicable to the other people who are in the same situation.

So you don't need a class action in order to have uniformity of decisions. You're not going to have a conflict in decisions. There's only one decision maker and we know enough, once you've ruled, not to bring the same thing back to you again and again.

For each of those reasons, Your Honor, the debtor

would argue that the complaint should be dismissed and the plaintiffs' claims for an administrative claim should be denied and they should otherwise be -- but they should otherwise be allowed to proceed on an individual basis with their proofs of claims as filed.

THE COURT: Let me, before you sit down; ask you the follow up on that comment about administrative claims being denied. Procedurally, this is a motion to dismiss an adversary proceeding brought by two named former employees purportedly on behalf all similarly situated employees seeking a determination that all members of the class are entitled to administrative claim status.

Is it your position that if I were to grant your motion to dismiss and relegate the individual members of this class to managing their claims through the individual proof of claim process, that there is any preclusive impact upon their ability, if they've already filed an appropriate claim for administrative claims status, to later prosecute that claim as an administrative claim. Or for that matter, to the extent that there is no administrative bar date yet set, does there -- is there anything about granting the motion to dismiss that would preclude members of this purported class from individually filing, prior to an administrative bar date, an administrative claim.

MR. O'NEILL: I do not believe that until the class is

certified that the non-named plaintiffs -- in other words, the punitive class members how aren't named plaintiffs are parties to the proceeding and so therefore I don't believe they are bound by your ruling. I think the only parties who are bound are the plaintiffs -- the individual plaintiffs themselves.

THE COURT: I understand that but I was really focused, perhaps myopically, on the comment you made about ordering that members of this class would not have administrative claims status if I were to grant your motion to dismiss. I don't think that's right and I'm not sure --

MR. O'NEILL: If that is what I said --

THE COURT: -- that's what you're asking for.

MR. O'NEILL: It is not what I'm asking for. If it's what I said, I misspoke. To the extent that I'm asking you to deny a request for an administrative expense claim, it is only as it relates to these two named plaintiffs. I do not -- I'm not attempting to foreclose anyone else from coming in, I don't think you can at this point. If they want to come in and assert a motion for an administrative claim, I don't think -- I'm not asking you to preclude them, I'm not sure you can.

THE COURT: Well, I'm not sure that -- I'll hear from the plaintiffs on this, it's a small point. But if I were to determine that the procedural choices made by these plaintiffs are inappropriate and that claim allowance is a matter not to be handled by means of adversary proceeding but by other means

during the course of the case, including, to the extent appropriate, the filing of administrative claims assuming such claims are still viable, it seems to me that even if I were to dismiss their complaint it would be without prejudice to their ability to at least attempt to assert administrative claims status unless it's your position that the granting of your motion to dismiss requires a determination as to the applicability of Straus-Duparquet to these claims. Because you've made both a procedural and a substantive argument, I believe that I would only be precluding these individual plaintiffs from asserting an administrative claim if I were to grant the motion on the basis of Straus-Duparque as opposed to granting the motion on a purely procedural basis.

MR. O'NEILL: I agree with that. If I understood Your Honor properly, your question was if you grant it on just the procedural basis would they be precluded and I think the answer to that is no.

THE COURT: Okay. Thank you.

MR. RAISNER: Good afternoon, Your Honor. Jack Raisner on behalf of the plaintiffs.

The piece that's missing from Mr. O'Neill's presentation, Your Honor, is what makes for this adversary to be appropriate and for this type of claim in the adversary to be appropriate. And the piece that's missing is that we're talking about compensation for employees who have lost their

jobs. In the vast panoply of claims that come before Your Honor, there's a special status that's been accorded because of concerns over the welfare of employees who lose their job, both in bankruptcy, in the Code, in the Second Circuit decisions and in the general law in our society. If a person loses their job they can go to the Unemployment Bureau to get money immediately.

The Second Circuit, in Straus-Duparquet, obviously has accorded a special status as an administrative claim for certain severance claims. The Bankruptcy Code, in 2005 was amended by Congress to add to Section 503(b)(1)(A)(ii) a back pay claim for employees whose pay has stopped wrongfully. And their back pay claim, if it is contemporaneous with the postpetition period, they have an administrative claim for that back pay.

THE COURT: But one of the problems you have though, is that these employees entered into prepetition severance agreements. And the claims that they have, as I understand it, arise out of agreements that were entered into on September 12, the Friday before the Monday filing of LBHI. And as noted by counsel, I'm familiar with the issue and dealt with it at least in another setting a couple of months ago when Ms. Hunter, through counsel, raised the same Straus-Duparquet argument and obviously it was a different procedural setting but the law's the same. I found that there was no basis for claiming, under

that severance agreement, that there was a right to a postpetition administrative claim. I also distinguished the prepetition agreement from the collective bargaining agreement that was applicable in the Straus-Duparquet situation because there the employees were terminated postpetition.

I also noted, during the course of that argument and colloquy, that as a matter of bankruptcy planning very frequently parties contemplating a bankruptcy in the Second Circuit will rather self-consciously and deliberately enter into severance arrangements with their employees in a reduction of force prebankruptcy so as to avoid the impact of Straus-Duparquet and the creation of administrative expense liability.

That being the case, how, if at all, do you distinguish the plaintiffs in your adversary proceeding from the situation that I've already addressed, recognizing, as has been mentioned by counsel, that I'm the same judge who heard that last one and unless you can distinguish this situation from that you're not likely to prevail.

MR. RAISNER: Your Honor, I had a chance to look at the transcript of the hearing in the Hunter matter and read it very carefully. I was surprised because, with all due respect Your Honor, you took the position that you did believe that Straus-Duparquet stands for the proposition that the only instance in which there'll be administrative claim is when the claimant has made an agreement postpetition with the debtor in

possession. And Straus-Duparquet is not ambiguous on that point, Your Honor. The case says very clearly that the collective bargaining agreement was with the debtor. The termination was by the debtor in possession.

THE COURT: Postpetition.

MR. RAISNER: The termination was postpetition.

THE COURT: Termination was postpetition.

MR. RAISNER: But the underlying severance policy, the plan, was a contract with the debtor prepetition.

THE COURT: But in this circumstance --

MR. RAISNER: Yes.

THE COURT: -- the severance agreements were entered into prepetition and the employment relationship was terminated prepetition.

MR. RAISNER: That, Your Honor, is a question of fact. The agreement said the separation would only occur months later. The employees were carried on the payroll as employees with their salary on payroll, with their benefits completely unaffected.

For Your Honor to say that as a matter of fact conclusively state that the termination took place when the debtor says it took place is putting the facts in the best light for the debtor but there's a dispute, as Mr. O'Neill said. Employment law generally doesn't look to when you agree to a termination, it's when things happen down the road that

affect the termination. And here there is a spectrum of events, and I appreciate Your Honor's point about planning, that these are carefully designed. That they were designed to continue the employee through something called a notice period, through something called a separate period after that, for a long period of time when they are on the books as employees and from my experience, Your Honor, if employers during that period can take advantage of saying that the termination takes place at some later point, they will do that.

For instance, in this case, the separation first starts in September but I bet if there was some government program that gave the employer a kickback or a return on some tax rebates if termination is set to take place in January of the following year, they could show to the government yes this was still an employee of ours in January of the following year. Look, he's got all -- he's been on the books, we can take advantage of some other -- for some other purpose that's advantageous to us.

I think this deliberate ambiguity in these continued relationships, sometimes called guard and leave where the person is, sort of, half in and half out, I think that's why there's an issue of fact for a little discovery Your Honor before we can say that the termination took place prior to the filing of the bankruptcy. Because there are theories, there's law, good law on, saying that the termination hasn't taken

place until certain things happen. We think that this stopping of payment, cutting off the compensation, is more an event of severance than anything else that took place until then. And that certainly took place postpetition, there's no question about that.

THE COURT: Is there any factual dispute as to the members of your class, your punitive class, that all of these individuals did no work for the debtor postpetition?

MR. RAISNER: We have -- we don't know all of the class members' identity. We've been approached by and have spoken to 150 or so. There are individuals among them who did provide services. I don't know how many but we do know of some, like Ms. Hunter.

Your Honor, in terms of Ms. Hunter's situation, let's be clear that she was not seeking what we're seeking. She was seeking a 160,000 dollar "special payment". That is not what I consider to be a Straus-Dup0arquet severance. I think Your Honor had grounds to look at that aspect of it, you could have denied the motion on that basis.

We are looking for those payroll payments that she wasn't even asking for for the notice period, for that eight weeks until November 8th. And try to understand, what was that if it wasn't employment. This is the issue that I don't think is actually even in conflict with your previous ruling, Your Honor.

THE COURT: I have a fundamental problem that you might as well address now that is somewhat comparable to the issue that I raised in a very different setting earlier today, if you were sitting through the CalPERS argument, where I was concerned about some case administration consequences of granting CalPERS relief from the automatic stay.

I have some similar case administration concerns with respect to the procedural approach that you have adopted here on behalf of members of this proposed class.

As you may or may not be aware, the claims administration process in the context of the Lehman bankruptcy cases is a massive undertaking that involves some sixty-plus thousand claims aggregating some 800 and some odd billion dollars. And based upon representations that have been made to the Court, the aggregate claims may swell, at some point, to more than a trillion dollars. And there is a very rigorous and carefully conceived claims process that has been established in this case, including the proof of claim process, process by which the debtors and their professionals are reviewing proofs of claim to determine those that may be worthy of objection and those that may be allowed. And what I don't understand is why it is appropriate for any claimants that have filed proofs of claim or that have scheduled claims to be asserting anything with respect to claim allowance in the context of an adversary proceeding. That's a real problem I have and that means it's a

problem you have.

MR. RAISNER: I admit I didn't follow the CalPERS argument all that well, Your Honor.

THE COURT: You don't need to have even listened to it.

MR. RAISNER: No, but I did hear the word piecemeal, Your Honor, and the concern about piecemeal claims assessments. Our experience, and we largely do one-action cases for the same type of back pay in bankruptcy courts around the country, our experience is that we actually are of some help to making the claims process for these types of situations more expeditious, more economical, in touch with the Court and not at odds with the Court.

There are, obviously, hundreds of proofs of claims that are coming through like Ms. Hunter's that are factually different in what the person has written down. They're going for one amount; we're going for different amounts. They seem, superficially, to be alike but they're very much different and many of them, as a result, have issues of proofs of fact or nuances that we think that we're in a good position to be able to sort through for the Court and can explain to people and to give an alternative to having 150 Ms. Hunters come before Your Honor and go over some issues which are the same, some of which are somewhat different. If they're not contested, Your Honor, I do step back. If the debtor's position is to allow all of

the proofs of claim at the levels that everyone has asked and there's no contention and there's no dispute, then I don't see the need for counsel for anybody.

But if there's a denial of the claim, for someone who's seeking relatively small amounts of money, at that time they've lost because we all know that they can't afford a lawyer to even ask the questions why have I been denied a priority, what can I do about it. And there's no one to step in and do that. We serve -- we see ourselves serving the Court, as officers of the Court, to be an intermediary and to make this a lot more efficient then it usually is.

If Your Honor's figured out a process which is much different then the traditional, ordinary bankruptcy procedures, then there is an opportunity for Your Honor, if you were to grant us status, if we're a class, we can make a motion for class certification, we can go over which is the better process and you can deny class certification. So allowing us to go the next step certainly hasn't precluded an analysis of which is the best process for these types of claims in this procedure.

Very often, most often, in fact almost always the debtor will stipulate to the class with us because with limited funds to hear individual people piecemeal, it's better to just have it done by one lawyer speaking who can do it for everyone and that is in concert with, I think, the Grant (ph.) case, Your Honor, where the speaking in unison for low level claims

for individuals who were not sophisticated, to have one lawyer able to do that for the group helps everyone's claim to come forward and not be lost in the mix and to have someone speak for them and, as I say, to actually make things easier for the Court.

THE COURT: Well, I appreciate your desire to ease my burden but the real issue that I'm focused on is whether, under these circumstances, it is appropriate, as a matter of bankruptcy law, for a particular class of creditors, regardless of whether they be former employees or swap counterparties, to be separately represented in an adversary proceeding that accelerates to an earlier phase of the case a claim allowance process that is well regulated, well respected, has bankruptcy rules that specifically relate to it and in this case a series of procedural orders that have been specially crafted to the needs of the case. Why would it ever be appropriate for one lawyer to purport to represent any subclass of claimants through an adversary proceeding when there already exists a set of procedures designed to deal with claim allowance?

MR. RAISNER: Obviously the adversary proceeding, Rule 7000, is part of the Bankruptcy Code and so it does have its uses.

THE COURT: Yes, I have a whole docket of adversary proceedings.

MR. RAISNER: Right. Okay. And I appreciate the

concern of more than just gate keeping, that if it's us why not everybody, which is a big problem. I think, going back to my first statement Your Honor, that the claims of employees for wages, having a special status both with regard to the substance and the procedure. The 7001 speaks to enforce declaratory judgments which could be why everyone could conceivably have one. But 7001(7), equitable relief, is for types of claims that are different form the plain vanilla money claim.

In our case, back pay has been considered equitable by virtually all courts, from the Supreme Court down. We have benefits which was promised our individuals which are ERISA benefits. Contrary to Mr. O'Neill, they did not give up their benefits. They did not give up their severance in the releases that our people signed. They have specific employee-related equitable claims that are not going to be had by swap vendors and other counterparties.

So both for the use of the adversary and for class certification, we are probably the thin pin on the map that is different from the rest that others will not fit into and yet, that pin has been elevated and accorded a special status in bankruptcy law and elsewhere, which is the rationale, Your Honor, for why the making of a difference for the use of Rule 23 for which, as you know, the adversary says is appropriate is good in keeping with the WT Grant line of cases of the Second

Circuit, that for employees this is the thing that works for them and it's part of the bankruptcy rules and it does not apply to the plain vanilla swap claimants.

You won't find a run on the use of adversary proceedings, Your Honor, if you say in the limited circumstance of employees with back pay, ERISA types of claims, the use of the equitable mechanism of adversary combined with a quick look to see if there is a class action or not, and perhaps to do that early rather than later so that other creditors know if there's going to be a priority claim. It makes some sense; we're not trying to get ahead of the line. Ms. Hunter came before us, there's no prejudice.

THE COURT: It seems to me -- I'm just going to disagree with you. You are getting ahead of the line by having filed this on behalf of the class that you purport to represent. And in talking about back pay I think you may be using a term that's inapplicable. These are claims, not for back pay but claims for payments otherwise payable pursuant to agreements entered into prior to the bankruptcy. These are payments in lieu of back pay. These are payments being made, if they're made at all, pursuant to a separate undertaking that was entered into as a prepetition contract arrangement which I believe distinguishes this from situations that you're probably referring to where parties have been -- have unpaid wages pursuant to the employment policies of a particular debtor in

possession, some of which may be prepetition, some of which may be postpetition and all of which are accorded the status that they're accorded under the Bankruptcy Code, some administrative, some priority, some neither.

So this is -- with respect to your argument, I view this as a clearly different situation. And in terms of case administration, not your adversary proceeding but the overall Lehman cases, I view it as very bad policy for anybody to be jumping the line that happens to have proofs of claim already filed.

MR. RAISNER: We're not seeking payment ahead of anyone. We're --

THE COURT: You are seeking a determination of rights under the prepetition contracts that would give rise to a right to payment. The broad definition of a claim in bankruptcy is a right to payment. This is a claim allowance adversary proceeding.

MR. RAISNER: The designation of the rights or the determination of the rights in the adversary, again I don't know the -- how many separate proofs of claim like Ms. Hunter's you've already heard but it seems as if it's within the period in which claims are being determined of this sort, in both the proof of claim process --

THE COURT: Let me assure you --

MR. RAISNER: Yes.

THE COURT: -- I have not determined the validity of any proof of claim and don't anticipate that that will happen any time soon. We're at a very, relatively early, stage of the most complex claim administration exercise ever undertaken in any bankruptcy court anywhere.

MR. RAISNER: I appreciate that, Your Honor. If there were a way to forestall the hearing of the adversary that would be in keeping with the overall schedule, I don't think it would prejudice anyone to fall into place, that's up to, it seems to me, calendar scheduling. I don't think that we have a right to insist that the adversary move at any particular speed or with any particular scheduling order. And again, if Your Honor senses that having these claims determined early is bad and not good, Your Honor certainly can order that, I think, without dismissing the adversary. If it otherwise could make sense to aggregate these claims of this group of people and take them in a group under one roof and not have a piecemeal process of having to go through them separately. We are really not trying to get ahead of the line by bringing the adversary. It's more a matter of trying to keep it economical.

THE COURT: Okay. Anything more from the debtor?

MR. O'NEILL: One very short point. The substance of the Straus-Duparque and that is there was some discussion about when these folks were terminated and I would suggest that it really doesn't matter when they were terminated because as soon

as they signed the separation agreements they no longer had a right to payment upon termination, which is all that Straus-Duparquet talks about. Once they signed the separation agreements they had a right to be paid every two weeks for a specific period, it didn't matter whether they were employed or not, they had that right to payment. It's not Straus-Duparquet where they had a right under the collective bargaining agreement, a contingent right to payment when and if you are terminated. That doesn't exist under those agreements -- under these separation agreements. And, in fact, any right they had to that sort of payment is explicitly released.

So I don't think that while they go to great lengths to say terminated cause -- I don't think it matters. I think these -- the separation agreements disposed of that issue and that's the only clarification we'd make.

THE COURT: Okay. I'm granting the debtors' motion to dismiss but it is without prejudice to the rights of the named plaintiff in the adversary proceeding and is also without prejudice to the rights of those members of the proposed class, some of whom have filed proofs of claim, some of whom may have scheduled claims an some of whom may not know the difference between an administrative and priority claim.

This is not a determination with respect to the merits of the legal rights of these individuals under Straus-Duparquet. This is a purely procedural ruling and I've already

spoken, in the course of the Hunter litigation, with respect to the application of Strauss-Duparquet to these severance agreements. But I accept the argument of plaintiff's counsel here that I do not yet have a full evidentiary record on the basis of which to make ultimate conclusions as to the rights of these individuals.

It appears to me, based upon the papers that I have reviewed, that Straus-Duparquet is inapplicable to these prepetition severance agreements but I am not precluding any member of the class at a later point in the case from being able to make whatever arguments can be fashioned to try to fit these agreements into a Straus-Duparquet construct. I think it will be difficult to do, if not impossible, but this ruling is not fundamentally determinative of those rights. This is simply a procedural ruling on a motion to dismiss.

I'm granting the motion because I'm convinced that an adversary proceeding is procedurally improper under these circumstances. Bankruptcy Rule 7001 authorizing adversary proceedings is no substitute for the filing of a proof of claim nor is it used to adjudicate the priority of a proof of claim, see Dade County School District v. Johns-Mansville, 53 B.R. 346, 352 (S.D.N.Y. 1985).

Additionally, the advisory committee notes Rule 7001 provides "Filing of proofs of claim and the allowances thereof are governed by Rules 3001 to 3005." The rules that govern and

are applicable to the filing, treatment, classification and objections to claims are governed by Rules 3001 to 3008. It is through these procedures that the plaintiffs can seek to have their claims adjudicated.

This process, particularly in the context of this bankruptcy case, promotes judicial economy and insures a fairness of distribution among all creditors. Because I find that the adversary proceeding is an inappropriate procedural means to deal with these issues of claim allowance, I also find that it is impermissible to deal with class certification issues in this setting.

Ordinarily, Rule 23 provisions are applied sparingly in Chapter 11 cases. The reason for that is that the bankruptcy process itself allows for a multitude of claimants to have their claims heard and determined in a single court.

As was stated recently in the Bally Total Fitness case, as a general matter "There is no absolute right to file a class proof of claim under the Bankruptcy Code." Under these circumstances, without prejudice to the rights of the plaintiffs, a class action is, in the Court's view, an entirely unnecessary and inappropriate procedure. And for that reason I grant the motion to dismiss.

To the extent that there are substantive arguments that have been made in the motion and in the argument made today by counsel for the debtors, those substantive points are

reserved for a future determination, if that ever happens in the context of the claim allowance process.

I'll accept an order consistent with this ruling.

MR. O'NEILL: Very well, Your Honor.

MR. RAISNER: Thank you, Your Honor.

THE COURT: We're adjourned.

MR. O'NEILL: Thank you, Your Honor.

(Proceedings Concluded at 4:29 PM)